

EXECUTIVE SUMMARY

Basic Assumptions of Transitional Justice and Children

Alison Smith

This paper approaches the “basics of transitional justice” through an investigative lens, examining the “who, what, when, where, why and how” of transitional justice. By breaking the broad issue of transitional justice into these constituent components, the paper aims to outline some common questions that need to be addressed when policy- and decision-makers are contemplating either the creation of a new mechanism or mechanisms, or how existing mechanisms could operate, particularly as they relate to children. Instead of taking a descriptive approach – listing what mechanism have been used and the effect, impact and results they have had – the paper aims to encourage a more analytic approach to the design and operations of transitional justice mechanisms so that they can respond more thoroughly to the needs of all stakeholders, particularly children, through presenting a framework within which a more detailed analysis could be done of how different mechanisms have achieved (or failed to achieve) their aims. This “bottom-up” approach can help in the examination of the building blocks of transitional justice, thereby scrutinising our basic assumptions, and assessing how the foundations of transitional justice might be either validated or re-constructed so as to make whatever mechanism or process comes from or within it as strong and effective as possible.

The paper begins with a discussion of what is meant by the term “transitional justice”, noting difficulties with finding a commonly-agreed definition and taking as a generally-agreed description the UN Secretary-General’s 2004 report on the rule of law and transitional justice. Refusing to box transitional justice into a rigid definition has the benefit of allowing a certain freedom when it comes to thinking about its aims and how those aims might be met. The most often stated aims of transitional justice are, in general, those most sought after: promoting peace, achieving reconciliation within and between divided societies, strengthening the rule of law and enhancing respect for human rights. Additional purposes that transitional justice is called upon to fulfil include cleansing of the State or society; restoration of a society’s confidence in State institutions; mending relationships between individuals, countries or within the region or the international community more generally; or, indeed, simply being able to say “something was done” and thereby closing (or attempting to close) the chapter on the past.

Particularly if a more formal mechanism or process is established, the rules that should be applied are reasonably clear: there are international and national laws that govern conduct at all times, whether in times of war or times of peace, and these laws can be appealed to and applied by transitional justice mechanisms or processes. This legal framework, concerning crimes under international law and the protection of fundamental human rights, is both fairly well settled and fairly comprehensive, taking root in several international legal instruments and norms that are applicable to most, and in some cases, all States.¹ In addition to these, general and specific human rights principles and prohibitions on the commission of crimes under international law are also included in numerous regional human rights instruments and in the Statutes and case law of international criminal courts and tribunals, the most recent of

¹ These include the Hague Conventions, the Geneva Conventions and their Additional Protocols; the Genocide Convention; and the Rome Statute for the International Criminal Court. General human rights principles are found in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Conventions of the International Labour Organisation; while specific issues form part of other human rights treaties, including the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Racial Discrimination and the Convention on the Elimination of Discrimination Against Women.

which is the International Criminal Court. There are some gaps in existing legal protections inside this relatively dense forest of laws and fundamental principles, but for the most part, these gaps are being filled either with new treaties or with case law and as the first decade of the twenty-first century draws to a close, there is a solid legal framework that provides both for the substantive law and for the possibility of the law being enforced or applied, whether against individuals or against the State.

The paper goes on to discuss the range of provisions within the general legal framework that apply specifically to children, highlighting the best interests of the child and a child's right to participate in decisions affecting their lives. Implementation of these rights lags far behind the articulation and examination of the theoretical and conceptual underpinnings of the framework itself. It is only fairly recently that the right of a child to participate in transitional justice processes has been recognised and the number of transitional justice processes and mechanisms that have expressly built children's participation into their standard operating procedures remains limited, which is matched by the relatively limited attention paid to children's experiences by transitional justice mechanisms and processes.² These developments still need to be matched by proper rules and procedures guiding children's participation, since while there have been some successes, there generally appears to have been a lack of thoroughness in understanding precisely what children need to help them participate fully and effectively in transitional justice mechanisms or processes.

The paper then undertakes an investigation of transitional justice, beginning with a description of the benefits of adopting an investigative approach and highlighting how this can help challenge basic assumptions about transitional justice, to avoid carrying ineffective assumptions from one mechanism to the next. Six basic questions are asked: Why pursue transitional justice? Who benefits from transitional justice? What mechanism or process should be used? When should transitional justice be implemented? Where should transitional justice take place? How can transitional justice meet its goals? The paper asks these questions by reference to the goals of transitional justice, as described above, and illustrates some successes and challenges through the experiences of a range of transitional justice mechanisms and processes, ranging from highly structured institutions like criminal courts to more loosely arranged approaches like national monuments and government apologies.

Following this examination, the paper concludes that the many variables and contexts within which transitional justice mechanisms operate means the full package of what works in one place will almost certainly not work elsewhere. In the case of children, this would be especially risky, since there are too few examples of mechanisms in which children have participated fully and satisfactorily and too few examples of mechanisms in which the needs, aspirations and specificities of children and how their rights might be exercised have been built in from the start. These risks can be mitigated if policy-makers articulate more clearly what the aims of transitional justice are and undertake a thorough investigation of how those aims can be met, including consulting broadly with all potential stakeholders, including children.

² This has begun to change recently with charges specifically relating to crimes against children being brought at the Special Court for Sierra Leone and at the International Criminal Court.